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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re

TYRRAN D. BURRELL,

On Habeas Corpus.

B280063

(Los Angeles County
Super. Ct. No. MA060633)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed.

Cindy Brines, under appointment by the Court of Appeal, for Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Mary Sanchez, Noah P. Hill and David W. Williams, Deputy Attorneys General, for Respondent.

Appellant Tyrran D. Burrell appeals from the superior court's denial of his motion to modify his sentence to strike four enhancements under Penal Code section 667.5, subdivision (b),¹ on the ground that the convictions underlying those enhancements were reclassified under Proposition 47 as misdemeanors and no longer support the enhancements. In our previous opinion, we affirmed the trial court's ruling. However, after granting review, the California Supreme Court vacated that decision and remanded the case for reconsideration in light of *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*). As we explain, in light of appellant's clear right to relief by way of habeas corpus under *Buycks*, and in the interests of judicial economy, we exercise our discretion to treat this appeal as a petition for writ of habeas corpus and grant relief. We strike the four section 667.5, subdivision (b) enhancements based on the reclassified offenses. Further, because the trial court imposed the maximum sentence, there is no need under *Buycks* to remand the case for resentencing.

BACKGROUND

On December 10, 2013, a jury convicted appellant of possession of a firearm by a felon (Pen. Code § 29800, subd. (a)(1)) and possession of ammunition (§ 30305, subd. (a)(1)). He admitted one prior strike conviction (§§ 667, subds. (a)-(i), 1170.12, subds. (a)-(d)) and six prior prison terms (§ 667.5, subd. (b)). The court sentenced him to a total term of 12 years in state prison, the maximum term possible: double

¹ All section references are to the Penal Code.

the upper term of three years for felon in possession of a firearm, plus one year each for the six prison priors; the court stayed the sentence on the conviction of possession of ammunition under section 654.

Defendant appealed from the judgment.

On November 4, 2014, while the appeal was pending, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act, which took effect on November 5, 2014. The initiative “reclassified as misdemeanors certain offenses that previously were felonies or ‘wobblers.’ It also added Penal Code section 1170.18, which permits those previously convicted of felony offenses that Proposition 47 reduced to misdemeanors to petition to have such felony convictions resentenced or redesignated as misdemeanors. Section 1170.18 allows those currently serving sentences for Proposition 47 eligible felony convictions to petition to have their sentences recalled and be ‘resentenced to a misdemeanor.’ (§ 1170.18, subd. (b).) It also allows those who have already completed their sentences for Proposition 47 eligible felony convictions to petition to have their convictions ‘designated as misdemeanors.’ (§ 1170.18, subd. (f).) Once an offense is resentenced or redesignated as a misdemeanor it ‘shall be considered a misdemeanor for all purposes.’ (§ 1170.18, subd. (k).)” (*People v. Buycks, supra*, 5 Cal.5th at p. 871.)

Pursuant to section 1170.18, appellant filed four petitions for redesignation in the superior courts of origin, seeking reduction of the felonies underlying four of his section 667.5, subdivision (b) prior prison terms to misdemeanors. On October 14, 2015, appellant’s petitions were granted in case Nos. MA020861 and MA033109. On May 6, 2015,

appellant's petition was granted in case No. MA043385. On January 22, 2015, appellant's petition was granted in case No. MA053732.

On February 2, 2016, we affirmed the judgment of conviction in a nonpublished opinion, B254383. The Supreme Court denied review on April 20, 2016, and the remittitur issued on May 9, 2016.

On December 28, 2016, after the original appeal was final, appellant moved in the superior court to modify his sentence to strike four prior prison terms (MA020861, MA033109, MA043385, MA053732) on the ground that the reduction of the underlying convictions to misdemeanors precluded imposition of the terms under section 667.5, subdivision (b). This appeal (which we will treat as a petition for writ of habeas corpus) seeks review of that ruling.

DISCUSSION

Section 1170.18, subdivision (k), provides: “A felony conviction that is recalled and resentenced under subdivision (b) or designated as a misdemeanor under subdivision (g) *shall be considered a misdemeanor for all purposes*, except that resentencing shall not permit that person to own, possess, or have in his or her custody or control a firearm or prevent his or her conviction under Chapter 2 (commencing with Section 29800) of Division 9 of Title 4 of Part 6.” (Italics added.) In *Buycks*, the Supreme Court held that “that the ‘misdemeanor for all purposes’ provision [of section 1170.18, subdivision (k)] operates prospectively—by having ameliorative effect on any new collateral consequence imposed after a successful Proposition 47 resentencing. However, [under the rule of *In re Estrada* (1965) 63 Cal.2d 740,]

because Proposition 47 is a measure designed to ameliorate punishment, the ‘misdemeanor for all purposes’ language also requires felony-based section 667.5 and 12022.1^[2] enhancements to be retroactively stricken, but only with regard to judgments that were not final at the time the initiative took effect.” (5 Cal.5th at p. 876; also *id.* at pp. 879, 883, 888.)

Here, appellant’s judgment in the case in which he moved for resentencing was not final when Proposition 47 took effect. Therefore, under *Buycks*, he is entitled to have the four section 667.5, subdivision (b) priors based on felonies later redesignated as misdemeanors stricken. However, under *Buycks*, appellant’s motion for resentencing was not the proper procedural vehicle to use.

Buycks noted that “nothing in Proposition 47 expressly provides a mechanism for recalling and resentencing a judgment because a prior underlying felony conviction supporting an enhancement in that judgment has been reduced to a misdemeanor.” (*Buycks, supra*, 5 Cal.5th at p. 892.) To fill that gap, the Supreme Court specified two procedures. First, the court held that under the full resentencing rule,³ “at the time of resentencing of a Proposition 47 eligible felony conviction,” the trial court must “reevaluate the applicability” of an

² As here relevant, section 12022.1, subdivision (b) provides a two-year enhancement for defendants who commit a new felony after having been released on his or her own recognizance on a prior felony arrest.

³ Under the full resentencing rule, when part of a sentence is stricken, a remand for a full resentencing is appropriate to allow the trial court to exercise its sentencing discretion in light of the changed circumstances. (*Buycks, supra*, 5 Cal.5th at p. 893.)

enhancement predicated on a now reduced felony conviction. (*Id.* at p. 894.) Second, the court concluded the collateral consequences of Proposition 47 could “properly be enforced by means of petition for writ of habeas corpus for those judgments that were not final when Proposition 47 took effect.” (*Id.* at p. 895.)

In the instant case, appellant’s current judgment is not eligible for resentencing (his underlying convictions of possession of a firearm by a felon and possession of ammunition were not affected by Proposition 47). Thus, the only avenue of relief available to him is a petition for writ of habeas corpus. We could require him to file a petition for writ of habeas corpus in the sentencing court, but we conclude that the better course is to deem this appeal to be a habeas corpus proceeding.

First, there is no doubt appellant is entitled to relief. Second, although *Buycks* acknowledged the full resentencing rule, it held that a remand for resentencing under that rule is not required when the sentencing court has already exercised its discretion to impose the maximum sentence possible. (*Buycks, supra*, 5 Cal.5th at p. 896, fn. 15.) In that situation, the striking of invalid priors leaves the sentencing court without further discretion to reformulate the sentence to approximate or equal the original sentence. In light of these circumstances, and in the interests of judicial economy, we deem this appeal to be a petition for writ of habeas corpus. (*People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4 [treating appeal as petition for writ of habeas corpus].) As such, we grant the writ, and strike the four section 667.5, subdivision (b) priors arising from case Nos. MA020861, MA033109, MA043385, MA053732. Because the trial court has already

imposed the maximum sentence, we do not remand the case for resentencing. Instead, we order the judgment modified to reflect the following sentence: the upper term of three years for the conviction of felon in possession of a firearm, doubled under the Three Strikes law, plus one year each for the remaining two section 667.5, subdivision (b) priors, for a term of eight years. The sentence on the conviction of possession of ammunition is stayed under section 654.

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DISPOSITION

The appeal is deemed to be a petition for writ of habeas corpus. We grant the writ, and strike the four section 667.5, subdivision (b) priors arising from case Nos. MA020861, MA033109, MA043385, MA053732. Further, we order the judgment modified to reflect the following sentence: the upper term of three years for the conviction of felon in possession of a firearm, doubled under the Three Strikes law, plus one year each for the remaining two section 667.5, subdivision (b) priors, for a term of eight years. The sentence on the conviction of possession of ammunition is stayed under section 654. The clerk of the superior court is directed to prepare an amended abstract of judgment and to send it to the Department of Corrections and Rehabilitation.

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WILLHITE, J.

We concur:

MANELLA, P. J.

COLLINS, J.